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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CHANCELLOR ROY S. NICKS, *et al.*,
Petitioners,

vs.

DR. WILLIAM CLARK FORD,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

CHARLES HAMPTON WHITE
W. OVID COLLINS, JR.
W. GREGORY MILLER
CORNELIUS & COLLINS
Eighteenth Floor
Third National Bank Building
P. O. Box 2808
Nashville, Tennessee 37219
(615) 244-1440

Attorneys for Respondent

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTION PRESENTED

Whether the Court of Appeals correctly concluded that an award of tenure to the Respondent pursuant to a unique Tennessee statute was proper to make Respondent whole for the discrimination which the district court and the Court of Appeals found had been practiced against him.

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The Respondent, Dr. William Clark Ford, opposes the petition for writ of certiorari in this case because the United States Court of Appeals for the Sixth Circuit correctly determined the question presented and there is no compelling reason why its decision should be reviewed by this Court.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 741 F.2d 858 (6th Cir. 1984) and is included as APPENDIX A in the Petition for Certiorari. The Memorandum Opinion and Order of the United States District Court for the Middle District of Tennessee, affirmed by the Court of Appeals, issued May 11, 1982, is reproduced as APPENDIX C to the petition for certiorari and is unreported as is the Order of the district court issued April 6, 1983, which is included as APPENDIX B to the petition for certiorari.

STATUTORY PROVISION INVOLVED

42 U.S.C. §2000e-5(g)

STATEMENT OF THE CASE

Dr. William Clark Ford, the Respondent, was first employed by Middle Tennessee State University at Murfreesboro, Tennessee, as a professor in the Department of Business Education for the 1970-71 academic year. Ford taught at MTSU a total of four years. At the time of his appointment, the law of Tennessee automatically granted tenure to a professor at a state university who successfully completed five years of employment. In August, 1973, Ford was given a final one-year contract. Ford had opposed unlawful employment practices at MTSU. He also assisted his wife in filing a charge of sex discrimination against the university. Ford filed suit in the United States District Court for the Middle District of Tennessee alleging that he had been terminated because of his opposition to unlawful employment practices of the university pursuant to 42 U.S.C. § 2000e-3.

The district court found that MTSU had intentionally discriminated against Ford and on May 11, 1982, ordered Ford reinstated at MTSU with full backpay and tenure status. On April 25, 1983, the district court reaffirmed its reinstatement of Ford with tenure.

Although the Petitioners appealed to the United States Court of Appeals for the Sixth Circuit, they did not challenge the district court's finding that Ford was the victim of retaliation in violation of the Act; instead, they argued only that the district court erred in awarding Ford tenure. The Court of Appeals in its August 23, 1984, decision rejected the argument of the Petitioners and on September 20, 1984, denied a petition for rehearing.

ARGUMENT

The Court Of Appeals And The District Court Properly Intrpreted This Court's Decisions In Making Respondent Whole Because Of The Discrimination And Retaliation Practiced Against Him.

Ford was employed at Middle Tennessee State University in 1970 at a time when Tennessee law automatically granted tenure to any professor at the state university who successfully completed five years of employment at the institution. *State ex rel. Chapdelaine v. Torrence,* 532 S.W.2d 542, 546 (Tenn. 1975), *cert. denied* 425 U.S. 953 (1976). Although the tenure requirements for state universities in Tennessee were subsequently changed, the five-year requirement was the law as of the time of Ford's employment as well as his last year of service, 1973-74, §49-1421, Tennessee Code Annotated, which was repealed by §49-8-301, Tennessee Code Annotated, in 1976. Thus the statutory provisions under which Ford was employed are now history and have no application in pending or future litigation involving faculties of state universities in Tennessee.

In the district court MTSU offered no evidence which would suggest Ford would not have been continued as a professor but for the retaliation practiced against him because of his wife's filing of a sex discrimination charge against the institution and Ford's protest over the sexually discriminatory policies of MTSU. Thus, the district court correctly concluded that, but for MTSU's unlawful discrimination against Ford, he would have continued as a member of the MTSU faculty [Pet. App. 36]. Even though MTSU offered no evidence to the district court to support its insistence that Ford should not have been awarded tenure, they argue in this Court that the district court erred in allocating the burden of proof with respect to the remedy the district court fashioned to correct the discrimination against Ford. Respondent submits the Petitioners have confused the requirements for proving liability with the standards this Court has announced for making victims of discrimination whole.

The Petitioners, in their first reason for urging their Petition for Certiorari be granted, state that "The Respondent did not, however, establish even a *prima facie* case of retaliation in regard to the award of tenure." [Pet. p. 4]. Petitioners, however, cite no authority for the proposition that before a victim of discrimination or retaliation can obtain relief, he must establish a separate prima facie case with regard to the remedy. As the decision of the district court reveals, tenure was found to be the only means of making Ford whole for the retaliation which the district court found had been practiced against him and about which the Petitioners do not complain. Furthermore, having heard all of the evidence, the district court decided the issue of discrimination and retaliation as directed by *United States Postal Serv. Bd. of Governors v. Aikens,* 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983).

Having correctly determined that Ford was the victim of unlawful discrimination and retaliation, the district court proceeded to fashion a remedy for Ford which would place him in the position he would have been but for the unlawful discrimination against him. *Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975). In *Albemarle Paper,* this Court, after reviewing the legislative history of Title VII stated:

> "The [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future . . . and where a legal injury is of an economic character, '[t]he general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured. The injured party is to be placed, as near as may be, in the same situation he would have occupied if the wrong had not been committed.' *Wicker v. Hoppock,* 6 Wall 94, 99, 18 L.Ed. 752 (1867)."
>
> 422 U.S. at 418, 419

Certainly, the district court followed this Court's teaching in *Albemarle*. It placed Ford in the same position he would have been had the wrong not been committed. Certainly, reinstatement with tenure for a faculty professor is as clearly a "make whole" remedy as an award of retroactive seniority for a truckdriver with this Court directed in *Franks v. Bowman Transportation Co.*, 424 U.S. 747 (1976).

The award of tenure in this case does not set any far-reaching precedent for judicial interference in tenure decisions generally. Unique provisions of Tennessee law, which have since been repealed, made tenure automatic for Respondent in the absence of the retaliatory discharge. As the district court noted, the Petitioners had "ample opportunity at trial to present testimony as to any other factor on which a decision to deny tenure may be based but failed to do so." [Pet. App. 36] Petitioners cannot now complain of an award of tenure to remedy their own wrongdoing. Neither the district court nor the Court of Appeals erred in directing William Clark Ford's reinstatement with tenure.

CONCLUSION

For the reasons assigned, the Respondent respectfully urges that the writ be denied.

Respectfully submitted,

CHARLES HAMPTON WHITE
W. OVID COLLINS, JR.
W. GREGORY MILLER
CORNELIUS & COLLINS
Eighteenth Floor
Third National Bank Building
P. O. Box 2808
Nashville, Tennessee 37219

Attorneys for the Respondent

CERTIFICATE OF SERVICE

I, Charles Hampton White, do hereby certify that a true and correct copy of the foregoing Brief In Opposition To Petition For Writ Of Certiorari has been mailed this 18th day of January, 1985, to W. J. Michael Cody, William B. Hubbard, Richard S. Doughty, and Christine A. Modisher, Attorney General and Assistant Attorneys General, State of Tennessee, 450 James Robertson Parkway, Nashville, Tennessee 37219.

CHARLES HAMPTON WHITE